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20 UNITED STATES DISTRICT COURT
21 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

22 In re FACEBOOK BIOMETRIC)	Master File No. 3:15-cv-03747-JD
23 INFORMATION PRIVACY LITIGATION)	
)	<u>CLASS ACTION</u>
24 This Document Relates To:)	
)	PLAINTIFFS' MOTION FOR APPEAL
25 ALL ACTIONS.)	BONDS
)	HEARING DATE: MAY 27, 2021
26)	
27		
28		

1 PLEASE TAKE NOTICE THAT on May 27, 2021 at 10:00 a.m., or as soon thereafter as
2 counsel may be heard, Plaintiffs will move the Court to require that the objectors who have
3 appealed the final judgment in this action to each post \$5,000 bonds to ensure payment of costs
4 on appeal. In support of their motion, they state as follows:

5 1. Dawn Frankfother, Cathy Flanagan, and Kara Ross lodged objections to the
6 settlement in this case. They each argued, among other things, that the settlement provided
7 insufficient relief, that the notice plan was not sufficient, and that the fees requested by class
8 counsel were too high. The Court overruled their objections in full, and they each filed notices of
9 appeal that became effective when the Court entered judgment on April 12, 2021. *See* Fed. R.
10 App. P. 4(a)(2). Frankfother and Flanagan are represented by the same counsel and filed a single
11 appeal; Ross filed her appeal separately. The Ninth Circuit has set briefing schedules but has not
12 consolidated the two appeals.

13 2. Federal Rule of Appellate Procedure 7 gives district courts discretion to “require
14 an appellant to file a bond or provide other security in any form and amount necessary to ensure
15 payment of costs on appeal.” As the Advisory Committee Notes to Rule 7 explain: “The
16 amended rule would leave the question of the need for a bond for costs and its amount in the
17 discretion of the court.” Fed. R. App. P. 7 adv. comm. note to 1979 amendment; *see also*
18 *Schulken v. Washington Mut. Bank*, No. 09-CV-02708-LHK, 2013 WL 1345716, at *4 (N.D.
19 Cal. Apr. 2, 2013) (“The need for a bond, as well its amount, are left in the discretion of the trial
20 court.”).

21 3. “The Ninth Circuit has not expressly delineated the factors courts should consider
22 under Rule 7, but courts in this district generally assess whether an appellant is (1) financially
23 able to post bond, (2) likely to raise arguments that will fail on appeal, and (3) unlikely to pay the
24 costs of an appeal if necessary.” *Zamora v. Lyft, Inc.*, No. 16-CV-02558-VC, 2018 WL 5819511,
25 at *1 (N.D. Cal. Nov. 6, 2018).

26 4. Here, the objectors have counsel and have paid the appellate docketing fees in
27 full, so there is no indication that they are not financially able to post a bond. Indeed,
28 “[g]enerally, district courts have found that this first factor weighs in favor of a bond unless a

1 party is financially unable to post a bond.” *In re Netflix Privacy Litig.*, No. 5:11-CV-00379-EJD,
 2 2013 WL 6173772, at *3 (N.D. Cal. Nov. 25, 2013). It is not sufficient for an objector-appellant
 3 to argue that a bond is burdensome; he or she must provide “evidence indicating a financial
 4 inability to pay.” *Id.*; *see also Embry v. ACER Am. Corp.*, No. C 09-01808 JW, 2012 WL
 5 2055030, at *1 (N.D. Cal. June 5, 2012), *on reconsideration*, No. C 09-01808 JW, 2012 WL
 6 13059929 (N.D. Cal. July 31, 2012) (noting that objector provided no evidence of inability to
 7 pay bond and ordering him to post \$70,650 bond within 14 days or dismiss appeal).

8 5. In addition, objectors’ arguments are likely to fail on appeal, given their
 9 threadbare arguments, the Court’s detailed opinion rejecting them, and the abuse of discretion
 10 standard that applies on appeal. *See Netflix*, 2013 WL 6173772, at *3 (finding this factor
 11 weighed in favor of an appeal bond where, as here, the district court “engaged in an extensive
 12 analysis of the Settlement, including the merits of the objections, and found the Settlement to be
 13 fair, adequate, and reasonable.”); *Schulken*, 2013 WL 1345716, at *5 (“Given the lack of
 14 meritorious grounds for [objector’s] previous challenges, the Court finds it likely that [objector]
 15 may not prevail on appeal.”).

16 6. Finally, there is concern that they might not pay a judgment for costs because they
 17 are outside the Ninth Circuit. *See Schulken*, 2013 WL 1345716, at *5 (ordering objector appeal
 18 bond where objector “resides in Washington State” and “it is not unreasonable . . . to anticipate
 19 difficulty in collecting costs awarded by this Court on appeal.”); *Embry*, 2012 WL 2055030, at
 20 *1.

21 7. Although the court of appeals may award attorneys’ fees in the case of a frivolous
 22 appeal, that amount cannot be considered when setting the amount of a bond. *See Azizian v.*
 23 *Federated Dep’t Stores, Inc.*, 499 F.3d 950, 960-61 (9th Cir. 2007). However, an objector’s bad-
 24 faith conduct remains “useful for assessing the likelihood that [she] will comply with any
 25 obligation to pay costs, and may also be relevant as a standalone consideration.” *Zamora*, 2018
 26 WL 5819511, at *2.

27 8. Here, Ms. Ross’s counsel, to whom she is married, has opted himself and a
 28 number of his family members (whom he also represents) out of the settlement. He is now

1 attempting to use Ms. Ross's ability to delay the settlement in order to extract a payment for
2 himself and his family. This is improper. *See Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir.
3 2003). Counsel for the other objectors has a well-documented history of similar behavior, and
4 there is no reason to believe that he will behave any differently here. *See, e.g., McKnight v. Uber*
5 *Techs., Inc.*, No. 14-CV-05615-JST, 2019 WL 3804676, at *5 (N.D. Cal. Aug. 13, 2019) (Tigar,
6 J.) ("John Pentz has been cited by numerous courts for filing frivolous objections in pursuit of a
7 payoff.").

8 9. A bond of \$5,000 for each appeal is the appropriate amount to ensure that the
9 objectors will pay Plaintiffs' costs in the likely event that their appeals are unsuccessful. *See,*
10 *e.g., Keller v. Nat'l Collegiate Athletic Ass'n*, No. C 09-1967 CW, 2015 WL 6178829, at *3
11 (N.D. Cal. Oct. 21, 2015) (requiring objectors to post \$5,000 appeal bond to cover costs); *Harris*
12 *v. Amgen Inc.*, No. CV075442PSGPLAX, 2017 WL 10442696, at *3 (C.D. Cal. July 18, 2017)
13 (same); *Allen v. J.P. Morgan Chase Bank, NA*, No. 15-3425, 2015 WL 12714382, at *1 (7th Cir.
14 Dec. 4, 2015) (modifying objectors' appeal bond to \$5,000). Indeed, \$5,000 is well-below appeal
15 bonds ordered in other large class settlements. *See, e.g., Miletak v. Allstate Ins. Co.*, No. C 06-
16 03778 JW, 2012 WL 3686785, at *2 (N.D. Cal. Aug. 27, 2012) (\$60,000 appeal bond, including
17 \$10,000 in FRAP 39(e) costs).

18 **WHEREFORE**, Plaintiffs request that Objectors Dawn Frankfother and Cathy Flanagan
19 be required to jointly post a \$5,000 appeal bond, and that Objector Kara Ross be required to post
20 a \$5,000 appeal bond.

1 DATED: April 21, 2021

s/Alexander G. Tievsky
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